No. 11843

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

CLOSING BRIEF FOR THE UNITED STATES

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AUTHORITIES CITED

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INTRODUCTORY STATEMENT

The opening brief of the United States as appellant was confined to argument in support of the Government's appeal from the District Court's decision that the goods composing four of the twenty-one shipments involved in the action were not "property of the United States" at the time of carriage and that the four shipments, therefore, failed to meet one of the

two qualifications for land-grant freight rates provided in Section 321 (a) of the Transportation Act of 1940.[1]

The United States submits this closing brief in answer to the Pacific Electric Railway Company's opening brief on its cross-appeal. This closing brief supports the decision of the District Court that all twenty-one shipments did meet the other qualification for land-grant rates in Section 321 (a) by virtue of the fact that all of the goods shipped were "military or naval property moving for military or naval and not for civil use" within the meaning of that section. The District Court held that seventeen of the shipments, being property of the United States, met both qualifications and were entitled to land-grant rates.

QUESTION PRESENTED BY CROSS-APPEAL

Whether all of the twenty-one shipments of component materials and parts for Liberty Ships moving on consignment to the United States Maritime Commission under Government bills of lading constituted "the transportation of military or naval property * * * moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940, and therefore (if also "property of the United States" within the meaning of the same section) were entitled to be moved at the reduced land-grant rates.

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[1] The District Court's opinion is reported at 71 F. Supp. 987.

SUMMARY OF ARGUMENT

I

The goods composing each of the shipments were "military or naval property moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940, as that phrase was construed by the Supreme Court last year in *Northern Pacific Ry. Co.* v. *United States,* 330 U. S. 248. The shipments in every respect meet the test there laid down by the Court, and that decision is controlling here.

The shipments were made by and delivered to the United States Maritime Commission for use by California Shipbuilding Corporation, a cost-plus contractor with the Commission, in building cargo ships of the "Liberty" design for the Commission. At the time of the shipments, these Liberty Ships were being constructed for a military or naval use. They were built for the United States in time of war to win the war. All the shipments herein of their component parts occurred after December 7, 1941, following the Japanese attack on Pearl Harbor. The applicable rates are to be determined as of the time of carriage; the use to which the goods were to be put was governed by the critical and emergency condition then existing when construction of the ships was for military rather than merely commercial purposes. The parts transported therefore partook of the military or naval character and purpose of the ships. They

were military or naval property within the meaning of Section 321 (a) of the Act. Any doubt about this should be resolved in favor of the Government, for Section 321 (a) was a legislative grant of a valuable public right to private interests, in which ambiguities are to be resolved in favor of the grantor. *Northern Pacific Ry. Co.* v. *United States, supra.*

The test in this case should not be confused with the very different test of the scope of "commerce" under the Fair Labor Standards Act. Under the definitions in that Act, a shipment of munitions belonging to the Army for military use in battle was "commerce." Of course, it was also, like the goods involved herein, military or naval property of the United States, moving for military or naval use and entitled to land-grant rates under Section 321 (a). To hold otherwise with respect to the shipments herein would emasculate the decision of the Supreme Court in the *Northern Pacific* case.

II

The goods, while being transported by railroad, were also "property of the United States." The present situation is analogous to that presented by an old postal case (*Searight* v. *Stokes,* 3 Howard 150), in which United States mail was held to be "property of the United States" and eligible for free transportation without toll over the Old Cumberland Road, even though the United States technically did not have title to the articles being transported.

ARGUMENT

I

The goods shipped were military or naval property moving for military or naval use within the meaning of section 321 (a) as construed by the Supreme Court in the Northern Pacific opinion

All parties concede that the goods composing seventeen of the shipments involved in this litigation were "property of the United States" at the time of carriage. The question now posed is whether they, as well as the goods in the other four shipments, were "military or naval property moving for military or naval and not for civil use." The District Court, finding the decision of the Supreme Court in *Northern Pacific Railway Company* v. *United States, supra,* controlling on this point, held that all twenty-one shipments met this qualification and that the seventeen (being property of the United States) were entitled to move at the reduced rates reserved in Section 321 (a) of the Transportation Act. This ruling was clearly correct and is indeed compelled by the holding of the Supreme Court in the *Northern Pacific* case.

The facts are agreed. The shipments were made and delivered to the United States Maritime Commission for use by the California Shipbuilding Corporation, a cost-plus contractor with the Commission, in building cargo ships of the "Liberty" design for the Commission (R. 21). The programming for this new ship construction was made after consultation with the Joint Chiefs of Staff; of the 2,610 Liberty

Ships constructed for the Maritime Commission up to 1945, the California Shipbuilding Corporation delivered 336 (R. 20).

Comparison of the present shipments with the controverted shipments in the *Northern Pacific* case shows no significant difference. In the latter case the shipments involved five types of property, all of which were held entitled to the reduced rates reserved in the statute. One shipment most directly similar to the present one involved copper cable, which was described by the Court in the following terms:

> *Copper cable.*—Copper cable was transported to Tacoma, Washington, for use in the installation of degaussing equipment (a defense against magnetic mines) on a cargo vessel being so built that it might readily be converted into a military or naval auxiliary. The work was done by a contractor under contract with the Maritime Commission. The degaussing specifications were furnished by the Navy which also furnished the equipment and bore the cost. *The vessel was delivered in 1941 and was operated as directed by the Maritime Commission or the War Shipping Administration. Whether it operated as a cargo vessel or as a military or naval auxiliary does not appear.* (*Id.,* p. 249.) [Italics added.]

In the present case, the goods shipped were component parts of hulls and engines for cargo ships which were also being constructed by a contractor for the Maritime Commission on a design which made the ship convertible as a military or naval auxiliary

(R. 17). The parts in question were variously described in the government's bills of lading as condensers, power boilers and fixtures, steel plates, sheets, angles and channels, and engine parts. All the shipments were consigned to the Maritime Commission in care of the cost-plus contractor at Los Angeles, for assembly into ships under the Emergency Ship Program (R. 84). The copper cable in the *Northern Pacific* case was to be used in "degaussing equipment" to protect a cargo ship from magnetic mines. Concededly, this was an important part of a Liberty Ship in wartime, but surely not more important than the hull or the engine for which the steel plates and parts composing the shipments in the present case were to be used.

It is true that the copper cable was shipped by the Navy Department, whereas the hull and engine parts in the present case were shipped by the Maritime Commission, a civilian agency, but the Supreme Court pointed out that this difference was of no consequence.

> The theory is that "military or naval" property means only property shipped by or under control of the Army or Navy.
>
> We see no merit in that suggestion. Section 321 (a) makes no reference to specific agencies or departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than

the War and Navy Departments. *Procurement of cargo and transport vessels by the Maritime Commission is an outstanding example.* See Merchant Marine Act of 1936, § 902, 49 Stat. 2015–2016, as amended, 46 U. S. C., § 1242.

* * * * *

Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. *An army or navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function* (Id., p. 252–3). [Italics added.]

1. The Liberty ships under construction for the Maritime Commission were military or naval property for military or naval use

There can be no doubt that Liberty ships were built as instruments of war. In times of war or impending war, the Merchant Marine has always been regarded at home and abroad as an auxiliary of the Army and the Navy to support their striking force. See Admiral Ernest J. King's *Third and Final Report to the Secretary of the Navy, United States Navy at War, 1941–1945*, p. 169; Robert Earle Anderson, *The Merchant Marine and World Frontiers* (1945), (pp. 140–142, 143); Col. Randolph Leigh, *48 Million Tons to Eisenhower,* (1945). Liberty ships were not built under the long-range program (46 U. S. C. Sec. 1120)

or under the construction differential subsidy (46 U. S. C. Sec. 1151). They were not built for prospective purchasers, but for the United States, and under conditions of grave emergency to win a war.[2]

It is important to bear in mind that *every shipment in this case occurred after December 7, 1941,* following the Japanese attack on Pearl Harbor.[3] All the ship-

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[2] Compare the statement of Commissioner Raymond S. McKeough, Maritime Commission, Hearings before the Committee on the Merchant Marine and Fisheries, H. R., 79th Cong., 2d Sess., on H. R. 3603, June 4, 1946, p. 18:

"We have 2,500 so-called Liberty ships. I hope that we will be able to sell some of them. They are not built for commercial purposes. I hope that the Congress understands that. They were built to win a war. They were built to carry war cargo—as much of it as they could put in the holds of the ships, to bring it to the place to be used for our armed forces. There are 2,500 of them. I doubt there will be very much in the way of recovery of money as a result of the sale of these ships."

[3] Attached to p. 38 of plaintiff's brief is a table showing the dates of the shipments. These dates appear in the sixth column of the table under the heading, "Date of Consignment," as follows:

Contract	*Date of Shipment*
Foster-Wheeler	January 26, 1943.
Combustion Engineering	December 16 & 17, 1941.
Inland Steel	December 9, 1941.
Carnegie	December 29, 1941.
Jones & Laughlin	January 6, 1942.
Otis Steel	December 21, 1941.
Youngstown Sheet & Tube	December 22, 1941.
Republic Steel	May 16 to 31, 1943.
Joshua Hendy	December 17, 1941, to January 1, 1942.
Joshua Hendy	February 23 to April 6, 1942.

The contractors are correlated with the contract numbers in the table at page 34 of the opening brief of the United States as appellant.

ments moved when the Nation was in a World War, under the critical and emergency conditions caused by a war shipping shortage. Whatever the declaration of policy may have been in the Merchant Marine Act of 1936, whatever any intervening committee reports might have stated, it is certain that on the dates of the shipments, the over-riding purpose and intent was to get Liberty Ships constructed as fast as possible in order to support our military and naval effort effectively. (See United States Maritime Commission, *Annual Report, 1945,* p. 3.)

Plaintiff's opening brief labors to construe a non-military intent from the various appropriation acts. An appropriation act to break a bottleneck in ocean shipping with a World War at our shores is not less effective because its terminology lacks sabre-rattling stridence. Actually, two of the Acts were specifically designated, "Defense Aid Supplemental Appropriation Act" (Act of March 27, 1941, 55 Stat. 53) and "First Supplemental National Defense Appropriation Act" (Act of August 25, 1941, 55 Stat. 669) and this evidences an understanding that military considerations controlled the Emergency Program for the construction of these Liberty Ships.[4] With the impact of Pearl Harbor, the nice distinctions drawn by the plaintiff between the Merchant Marine Act of

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[4] Even the Merchant Marine Act of 1936 placed the military purpose first. Its first words were, "*It is necessary for the national defense.* * * *" (49 Stat. 1985, 46 U. S. C., Sec. 1101).

1936, the Act of February 6, 1941, the Act of March 27, 1941, and the Act of August 25, 1941, could no longer be made.

Clearly, at the time when the goods herein were transported, they all were moving for the military ends to which they were adaptable. Plaintiff's opening brief (p. 38) correctly states the rule that, *"The rates applicable to a shipment are determined as of the time the shipment is delivered to the carrier."* That is the time that controls, and at that time the use to which the property was to be put was surely military or naval. History had moved beyond the confines of the pre-war intent which plaintiff would infer from earlier statutes, committee reports, and statements before Congressional committees running as far back as 1936.

Nor does plaintiff challenge the expedience, prudence, and necessity of the governmental expenditures. They were administratively determined as required for military or naval purposes by the appropriate executive agency. The Maritime Commission determined by resolution adopted December 4, 1942, that all shipments after December 7, 1941, under its programs were of military property for military use. *Cf.* 21 Comp. Gen. 137 (plaintiff's opening brief, appendix p. 34). It disclaimed reduced freight rates on property shipped after "VJ-Day", September 1, 1945, by resolution adopted July 2, 1946. The Maritime Commission resolution of December 4, 1942, attests the good faith and responsibility of the Com-

mission in ascertaining whether the shipments were military property:

> * * * Prior to the entry of the United States into the present war on December 8, 1941, there was no basis for a determination by the Commission as of the time of transportation of any such materials, equipment and supplies that upon completion any particular vessel or group of vessels would be devoted primarily to the purposes of war rather than to the purpose of commerce; * * *

After that date, however,

> * * * it became apparent that all merchant vessels then in the process of construction and thereafter to be constructed until the termination of the present war were to be devoted primarily to the purposes of war, rather than to the purposes of commerce * * *[5]

Executive determinations of that character bear at least a *prima facie* validity.

The category of "military property" is elastic, varying with the times. It was broadest when a nation like the United States was mobilizing for and waging a global war on a scale beyond all historic precedent. The concept of military property is not a lifeless abstraction but eminently practical and

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[5] Plaintiff states incorrectly that this was the first official action of the Maritime Commission claiming that shipments of parts for cargo ships qualified for land-grant rates (Opening Brief, p. 31). Compare the Foster-Wheeler bill of lading, which stated that the goods to be shipped thereunder were "military or naval property of the United States moving for military or naval and not for civil use" and was issued by the Maritime Commission September 23, 1942, the statement quoted having been affixed by a rubber stamp (R. 23). Some of the other bills of lading were similarly stamped (R. 21, 23, 34).

sensitive to the march of events and the demands of modern war. Goods procured by the Government on a military basis for purposes of security to support the Army and Navy at war, were military or naval in character and purpose.

> Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under § 321 (a). (*Northern Pacific* opinion, *supra,* p. 254–5).

2. The component parts and materials for the Liberty ships were also military or naval in character and purpose

Whatever doubts that may have existed on this score have been set at rest by the *Northern Pacific* opinion. There, the railroad company argued that even if emergency cargo ships built by the Maritime Commission were military or naval in their nature and purpose, the same could not be said of materials and parts therefor, since they were merely supplied

"for manufacture and construction which are civilian pursuits and which were here in fact performed by civilian contractors. Only the completed product, not the component elements, was, in that view, for military or naval use" (*Id.* p. 254). The Supreme Court rejected that contention, saying:

> It is also suggested that the property covered by the exception in § 321 (a) is confined to property for ultimate use directly by the armed forces. *Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be "military or naval" property. We likewise reject that argument.*
>
> * * * * *
>
> The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern Pacific Co.* v. *Defense Supplies Corp.,* 64 F. Supp. 605. Within the meaning of § 321 (a) an intermediate manufacturing phase cannot be said to have an essential "civil" aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling (*Id.* 253, 255). [Italics added.]

Measured by that test there can be no question that the present shipments of the component parts of the cargo ships were military or naval property moving for military and naval use under Section 321 (a) of the Act.

The cases defining "Commerce" within the meaning of the Fair Labor Standards Act cited by the plaintiff in its opening brief (pp. 32–35) have no relevance. The plaintiff discusses the decision in *St. John's River Shipbuilding Co.* v. *Adams,* 164 F. (2d) 1012 (C. C. A. 5), a suit under the Fair Labor Standards Act for overtime pay, which held that employees constructing Liberty Ships for the United States at a Government-owned shipyard, using only Government-owned materials and tools, were engaged in the production of goods for "commerce." The suggestion is that if a Liberty Ship is "for commerce," *ipso facto* it is not "for military or naval use" under Section 321 (a) of the Transportation Act. This suggestion of mutually exclusive categories is quite unsound.

"Commerce" is defined in the Fair Labor Standards Act to mean:

> Trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof. (Sec. 3 (b), 29 U. S. C. Sec. 203 (b)).

In construing this definition, the Supreme Court has recognized that it was the purpose of the Fair Labor Standards Act to extend its control "throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 567. That Act required the maintenance of labor standards in the production of goods to be transported by the Government for war use no less than if the goods were for nonwar use. Accordingly, the courts have held that not only the manufacture of Liberty Ships, but "the manufacture of shells, explosives, and

munitions for the armed forces, under a cost-plus-fixed-fee contract with the United States Government" is production of goods for "commerce". *Bell* v. *Porter,* 159 F. (2d) 117 (C. C. A. 7), cert. den. 330 U. S. 813.[6] Thus, in the *St. John's River Shipbuilding* case, the court was merely following the established interpretation of the concept of commerce within the meaning of the Fair Labor Standards Act. It was quite correct to hold that the manufacture of shells, explosives, and munitions for the armed forces was for commerce—*even though the goods were military property of the United States,* which, when shipped by rail, would of course also be entitled to land-grant freight rates as "military or naval property moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act. Since goods, therefore, can be at the same time "for commerce" under the Fair Labor Standards Act and simultaneously "for military or naval use" under the Transportation Act, the Fair Labor Standards cases are irrelevant to the interpretation of Section 321 (a).

On April 30, 1948, this irrelevance was specifically pointed out by the United States District Court for the Southern District of California. In *Devine* v. *Joshua Hendy Corporation* (Central Division No.

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[6] See, also, *Ware* v. *Goodyear Engineering Corp.*, 11 Labor Cases (S. D. Ind.) par. 63,204; *Moehl* v. *duPont de Nemours & Co.*, 12 Labor Cases, (N. D. Ill.), par. 63,545; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28 (S. D. Iowa); *Lasater* v. *Herculas Powder Co.*, 73 F. Supp. 264 (E. D. Tenn.); *Bumpus* v. *Remington Arms Co., Inc.*, 74 F. Supp. 788 (W. D. Mo.); *Jackson* v. *Northwest Airlines, Inc.*, 75 F. Supp. 32 (D. Minn.).

6176–Y, 14 C. C. H. Labor Cases, Par. 64,496), Judge Yankwich held that construction of cargo ships and assault troop ships for the Government during the war was for "commerce" within the scope of the Fair Labor Standards Act, and he carefully distinguished the criteria of commerce under that Act from the criteria of Section 321 (a) of the Transportation Act. While under the *Northern Pacific* opinion the ships were classifiable as military or naval property for military or naval use, he deemed that fact quite irrelevant to the Fair Labor Standards Act and entirely compatible with a classification "for commerce" under the latter Act.

Lastly, as pointed out in the opening brief of the United States as appellant (pp. 27–29), whatever ambiguities may exist in Section 321 (a) should be resolved in favor of the United States. By enacting that section, Congress bestowed the legislative grant of an extremely valuable public right to private companies operating land-grant railroads. Therefore, under the established canon of statutory construction, any ambiguity is to be resolved in favor of the grantor. The Supreme Court was very clear about this in the *Northern Pacific* opinion:

> Petitioner also contends that § 321 (a) is a remedial enactment which should be liberally construed so as to permit no exception which is not required. Cf. *Piedmont & N. Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311–312. But it is a familiar rule that where there is any doubt as to the meaning of

a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest," the doubt should be resolved in favor of the Government and against the private claimant. *Slidell* v. *Grandjean,* 111 U. S. 412, 437. See *Southern Ry. Co.* v. *United States,* 322 U. S. 72, 76. That rule has been applied in construing the reduced rate conditions of the land-grant legislation. *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 401; *Southern Ry. Co.* v. *United States, supra.* That principle is applicable here where the Congress, by writing into § 321 (a) an exception, retained for the United States an economic privilege of great value. The fact that the railroads, including petitioner, filed releases of their land-grant claims in order to obtain the benefits of § 321 (a) is now relied upon as constituting full consideration for the rate concession. It is accordingly argued that the railroads made a contract with the United States which should be generously construed. Cf. *Russell* v. *Sebastian,* 233 U. S. 195, 205. The original land-grants resulted in a contract. *Burke* v. *Southern Pacific R. Co.,* 234 U. S. 669, 680. Yet, as we have seen, they were nonetheless public grants strictly construed against the grantee. The present Act, though passed in the interests of the railroads, was *in essence merely a continuation of land-grant rates in a narrower category. Therefore, it, too, must be construed like any other public grant* (330 U. S. 248, 257). [Italics added.]

"The Act was the product of a period, and courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *Great*

Northern R. Co. v. *United States,* 315 U. S. 262, 273. By reserving land-grant rates in the Transportation Act, enacted on September 18, 1940, Congress intended to save public funds in the vast mobilization program for defense which Congress was then contemplating and undertaking.

II

The goods composing these shipments were property of the United States

No extensive comment is required in reply to the argument by plaintiff on this point, in its opening brief (pp. 41–44), and little need be added to what was stated on this subject in our opening brief. The cases cited by plaintiff (p. 41)[7] are not controlling adversely to the United States, for reasons already argued in our opening brief.

The Supreme Court in *Illinois Central R. Co.* v. *United States,* 265 U. S. 209, 214, characterized a parallel situation most aptly:

> The Government dealt with the consignors as if the property was its—dealt with the Railroad Company as if the property was its, the Government's, and, as we have seen, the Railroad Company dealt with the Government on that assumption, and the contractors dealt with it on that assumption. The incidental regulations between it and the contractors cannot divest that

[7] *United States* v. *Galveston, Harrisburg & San Antonio Railway Company,* 279 U. S. 401; *Oregon-Washington Railroad & Navigation Company* v. *United States,* 255 U. S. 339; *Henry H. Cross Co.* v. *United States,* 133 F. (2d) 183 (C. C. A. 7); *Illinois Central Railroad Company* v. *United States,* 265 U. S. 208; *Louisville & Nashville Railroad Company* v. *United States,* 267 U. S. 395.

> ownership in the interest of the Railroad Company.

A suggested analogy is found in the old postal case of *Searight* v. *Stokes,* 3 Howard 150. The scope of the term "property of the United States" came up in the following way. In 1831, Pennsylvania appropriated funds to take over and maintain the Cumberland Road. The Pennsylvania statute provided for collection of tolls, with this proviso:

> That no toll shall be received or collected for the passage of any wagon or carriage laden with the *property of the United States,* or any cannon or military stores belonging to the United States, or to any of the States comprising this Union (*Id.* p. 164). [Italics added.]

The question was whether tolls could be charged for wagons laden solely with the United States mail. In an opinion by Taney, C. J., the Supreme Court held that mail was "property of the United States" even though the United States lacked title in the technical sense (*Id.* 168). This early interpretation of the phrase was in connection with the rights of the United States to transportation privileges over routes constructed with public aid. This is the very context in which the same phrase was used in Section 321 (a).[8]

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[8] A new development sheds further light on the clauses in the Carnegie, Inland, Otis, and Youngstown sales contracts purporting to reserve title in the seller. The opening brief for the United States as appellant (pp. 16–17, n. 3) pointed out that the true function of those form-clauses was to protect the basing-point delivered-price system in the steel industry developed from "Pittsburgh plus," for commercial sales. The importance of that consideration is emphasized by a current press report. On July 8,

CONCLUSION

For reasons stated in the opening brief of the United States as appellant, the shipments were property of the United States. Accordingly, the appeal of the United States should be sustained and the District Court reversed in its ruling which denied land-grant rates on four of the shipments on the ground that they were not "property of the United States" within the meaning of Section 321 (a).

For reasons stated in this brief, all of the goods shipped were military or naval property moving for military or naval use within the meaning of Section 321 (a) as interpreted in the *Northern Pacific* case. Accordingly, the plaintiff's cross-appeal should be dismissed.

1948, the *New York Herald Tribune* contained a leading news item (pp. 1, 31) beginning (after the headlines) as follows:

"A new steel price system which may upset the price scale for all heavy industry and conceivably could force relocation of some of the nation's greatest manufacturing centers was announced yesterday by the United States Steel Corporation.

"Abandoning a price method in general use for more than fifty years in the steel industry, the corporation said that it is going to sell steel on an f. o. b. mill basis. Heretofore the industry has adhered to the so-called basing-point system, in which steel companies have absorbed some of the freight delivery costs in order to meet competition when selling to customers far removed from steel-producing centers.

"In his statement announcing the change, Benjamin F. Fairless, president of U. S. Steel, made no attempt to mitigate the 'hardships and dislocations' in store for industry. The step, he said, was forced by a Supreme Court decision outlawing the basing-point price system in the cement industry . . ."

See *Federal Trade Commission* v. *Cement Institute et al.*, 333 U. S. — (Nos. 23–34, April 26, 1948).

Respectfully submitted.

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